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(i) The form and fit of the article; and

(ii) The function and performance capability of the article.

(3) A designation that an article or service has a critical military or intelligence advantage such that it warrants control under this subchapter is made, on a case-by-case basis, by the Department of State, taking into account:

(i) The function and performance capability of the article; and

(ii) The nature of controls imposed by other nations on such items (including the Wassenaar Arrangement and other multilateral controls).

NOTE 1 TO PARAGRAPH (d): The *form* of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. The *fit* of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. The *function* of a commodity is the action or actions it is designed to perform. *Performance capability* is the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency).

NOTE 2 TO PARAGRAPH (d): For software, the *form* means the design, logic flow, and algorithms. The *fit* is defined by its ability to interface or connect with a defense article. The *function* means the action or actions the software performs directly related to a defense article or as a stand-alone application.

Performance capability means the measure of the software's effectiveness to perform a designated function.

(e) The Directorate of Defense Trade Controls will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction. If after 45 days the Directorate of Defense Trade Controls has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.

(f) State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures. State shall notify Defense and Commerce of the initiation and conclusion of each case.

(g) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Deputy Assistant Secretary of State for Defense Trade Controls. The Deputy Assistant Secretary's determination of the appeal will be provided, in writing, within 30 days of receipt of the appeal. If desired, an appeal of the Deputy Assistant Secretary's decision can then be made to the Assistant Secretary for Political-Military Affairs.

[58 FR 39283, July 22, 1993, as amended at 71 FR 20536, Apr. 21, 2006; 75 FR 46843, Aug. 4, 2010; 78 FR 22753, Apr. 16, 2013; 79 FR 8084, Feb. 11, 2014]

§ 120.5 Relation to regulations of other agencies.

(a) If a defense article or service is covered by the U.S. Munitions List set forth in this subchapter, its export and temporary import is regulated by the Department of State (*see also* § 120.2 of this subchapter). The President has delegated the authority to control defense articles and services for purposes of permanent import to the Attorney General. The defense articles and services controlled by the Secretary of State and the Attorney General collectively comprise the U.S. Munitions List under the Arms Export Control Act (AECA). As the Attorney General exercises independent delegated authority to designate defense articles and services for purposes of permanent import controls, the permanent import control list administered by the Department of Justice has been separately labeled the U.S. Munitions Import List (27 CFR part 447) to distinguish it from the list set out in this subchapter. In carrying out the functions delegated to the Attorney General pursuant to the AECA, the Attorney General shall be guided by the views of the Secretary of State on matters affecting world peace and the external security and foreign policy of the United States. The Department of Commerce regulates the export, reexport, and in-country transfer of items on the Commerce Control List and other items subject to its jurisdiction, as well as the provision of certain proliferation activities, under the Export Administration Regulations (EAR) (15

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CFR parts 730 through 774). For the relationship of this subchapter to regulations of the Department of Energy and the Nuclear Regulatory Commission, *see* § 123.20 of this subchapter.

(b) A license or other approval from the Department of State granted in accordance with this subchapter may also authorize the export of items subject to the EAR (*see* § 120.42 of this subchapter). Separate approval from the Department of Commerce is not required for these items when approved for export under a Department of State license or other approval. Those items subject to the EAR exported pursuant to a Department of State license or other approval would remain under the jurisdiction of the Department of Commerce for any subsequent transactions. The inclusion of items subject to the EAR on a Department of State license or approval does not change the jurisdiction of the items. (*See* § 123.1(b) of this subchapter for guidance on identifying items subject to the EAR in a license application to the Department of State.)

[78 FR 22753, Apr. 16, 2013; 78 FR 61754, Oct. 3, 2013]

§ 120.6 Defense article.

Defense article means any item or technical data designated in § 121.1 of this subchapter. The policy described in § 120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in § 121.1 of this subchapter. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

[79 FR 61227, Oct. 10, 2014]

§ 120.7 Significant military equipment.

(a) *Significant military equipment* means articles for which special export controls are warranted because of their

capacity for substantial military utility or capability.

(b) Significant military equipment includes:

(1) Items in § 121.1 of this subchapter which are preceded by an asterisk; and

(2) All classified articles enumerated in § 121.1 of this subchapter.

[58 FR 39283, July 22, 1993, as amended at 62 FR 67275, Dec. 24, 1997]

§ 120.8 Major defense equipment.

Pursuant to section 47(6) of the Arms Export Control Act (22 U.S.C. 2794(6) note), *major defense equipment* means any item of significant military equipment (as defined in § 120.7) on the U.S. Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000.

§ 120.9 Defense service.

(a) *Defense service* means:

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (*see* § 120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (*See also* § 124.1.)

(b) [Reserved]

[62 FR 67275, Dec. 24, 1997]

§ 120.10 Technical data.

(a) *Technical data* means, for purposes of this subchapter:

(1) Information, other than software as defined in § 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance